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CHARLES E.

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1934.

No. 60

THE INDIANA FARMER'S GUIDE PUBLISHING COMPANY,

Petitioner,

vs.

THE PRAIRIE FARMER PUBLISHING COMPANY, WALLACE PUBLISHING COMPANY, THE WISCONSIN FARMER COMPANY, THE McKELVIE PUBLISHING COMPANY, WEBB PUBLISHING COMPANY, MIDWEST FARM PAPER UNIT, INC.,

Respondents.

ON WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

RESPONDENTS' BRIEF.

Mr. MAXWELL V. BEGHTOL,
Lincoln, Nebraska,
Mr. THOMAS E. MURPHY,
Chicago, Illinois,
Mr. BURKE G. SLAYMAKER,
Indianapolis, Ind.,
Mr. CLARENCE F. MERRELL,
Indianapolis, Ind.,

Counsel for Respondents.

BARNARD & MILLER, Printers, FRAnklin 0562, CHICAGO

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RESPONDENTS' BRIEF

STATEMENT OF THE CASE.

The Indiana Farmer's Guide Publishing Company, the petitioner, will be referred to as the plaintiff, and the six respondents will be referred to as the defendants. Plaintiff brought an action under Section 7 of the Sherman Anti-Trust Act (26 Statutes, p. 210; 15 U. S. C. A., Section 15) claiming that its business had been injured by a conspiracy

in restraint of interstate commerce and a monopoly of interstate commerce in violation of Sections 1 and 2 of the act (15 U. S. C. A., Sections 1 and 2). The particular complaint of the plaintiff is to the effect that the defendants, except Midwest Farm Paper Unit, all being publishers of newspapers circulating mainly to farmers, sold advertising in their respective papers to those who desired to buy it at a combination rate; that is to say, the defendants made a cheaper rate to an advertiser who would place his advertisement in all of the papers published by the defendants than the rate would be if their advertising would be placed in only one journal published by the defendants. It is claimed that this joint advertising rate was a restraint of interstate commerce and a monopoly of interstate commerce and operated to the injury of the business of the plaintiff in violation of the Sherman Anti-Trust Act.

At the trial it was shown that from 1928 to 1932 inclusive there were circulated in the United States approximately three hundred different weekly magazines subscribed for principally by agricultural interests, 282 of which were circulated in the State of Indiana. (Exhibit 29, R. 83; Exhibit 32, R. 93; Exhibit 35, R. 103; Exhibit 30, R. 85; Exhibit 31, R. 87; Exhibit 38; R. 128.) The circulation of each of these publications, together with the states in which they are circulated, is shown in Exhibits 29 to 40, inclusive. (R. 83-119.) The figures do not include country weeklies nor country dailies nor city dailies nor all the farm papers, but only the farm papers which are members of the Audit Bureau of Circulation, an organization of publishers which testifies to the truthfulness of the circulation statements, checks the statements made by the publishers and verifies their truth. (R. 121.) There are other publications than those listed in the exhibits on which accurate figures are not available. (R. 121.) The total number of

all papers circulated in Indiana as shown on the exhibits is 669,989. There are 181,575 farms in Indiana as shown by the United States census for 1930, and thus the exhibits show that there are published and circulated in Indiana three farm papers to every farm. (R. 121.) In the publishing business national farm papers are papers which have a circulation in every state in the union, such as Capper's Farmer, published in Kansas; the Country Gentleman, published in Philadelphia; the Country Home, published in Ohio; the Farmer's Wife, published in St. Paul; the Farm Journal, published in Philadelphia, and the Successful Farmer, published in Des Moines. (R. 121, 122.) These national papers have a circulation in Indiana of 365,274 which means there are two national papers to each farm in Indiana. (R. 122.) The circulation of the newspapers published by the plaintiff in 1928, per week, was approximately 160,000. In 1929, 1930 and 1931 it was the same. In 1932 it was 165,000. (R. 56.) The volume of advertising is called in the trade "lineage." Lineage is the measure of the publisher when he is selling advertising. (R. 126.) The number of lines carried by all of the farm journals' members of the Audit Bureau of Circulation for the years 1928 to 1932, inclusive, is shown by Exhibit 41 (R. 123, 124) and that exhibit also shows the percentage of the total advertising for those years carried by the defendants. The exhibit shows that in 1928 the defendants carried 14.96 per cent of all of the advertising; in 1929, 15.61 per cent; in 1930, 17.79 per cent; in 1931, 18.15 per cent, and in 1932, 17.52 per cent appearing in all farm journals in the United States that were members of the Audit Bureau of Circulation. (R. 126.) It shows that the entire industry in the period from 1928 to 1932 decreased in volume of business from 20,000,000 lines to 8,000,000 lines. (R. 126.) The exhibit shows that from 1928 to 1932 the

plaintiff lost 71 per cent of its business, the defendant Nebraska Farmer lost 70 per cent, the Prairie Farmer lost 66 per cent, Wallace's Farmer and the Iowa Homestead lost 59 per cent, and the Wisconsin Agriculturalist lost 57 per cent. The field of advertising is very highly competitive. The channels through which advertising is carried to farms is by national farm papers, other farm papers, radio, direct mail, daily and weekly newspapers, bill boards, general magazines, vocational papers, farm organization papers and country newspapers. (R. 129.) The keenest competitors of the publishers of papers like those of the plaintiff and the defendants are the national farm papers, because they have a large circulation and an economy of production and are able to offer lower advertising rates on the basis of the volume of circulation. (R. 129.) Local farm papers found it increasingly difficult to meet the competition of the national farm papers because of the low rates made by the nationals and because of the necessity of maintaining a large enough advertising force to solicit the accounts, and these conditions got worse as time went on. (R. 130.) To meet the competition of the national papers an organization composed of local papers called Standard Farm Papers was made in 1908, which organization commenced to make combinations or joint rates, which made it possible for the local papers in combination to offer to advertisers not as low a rate as the nationals were able to make, but to come somewhere near it in a relatively better competitive position. (R. 130.) Advertising agencies who handle most of the advertising have a preference for papers of large circulation. It is easier for them to place an advertisement in one paper of one or two million circulation than it is to duplicate the electrotypes and furnish the same ad for a dozen small papers. (R. 130.)

The Midwest Unit (one of the defendants) was the name

of a group of standard farm papers. (R. 131.) The functions of the Midwest Unit are to solicit advertising and to accept one contract for all its members. Rates are quoted for publication in all those newspapers and a wholesale rate is given, if the advertiser buys space in all the papers. (R. 131.) The members of this group have nothing to do with fixing the rates of any of the member papers nor do they have any control over the business of any of the other members. The management of each paper fixes the rates of its individual paper. (R. 132.) The rates are constantly changing due to competition, change in circulation and addition and subtraction of papers. When advertisements are sold in a combination rate the discounts are given, because it is more economical to handle by elimination of solicitors and agency offices. (R. 133.)

The record in this case shows the following to be undisputed facts with reference, for example, to the year 1931:

I.

The circulation of the defendants in Indiana was (Only the Prairie Farmer circulated in Indiana.) (Record, 85.)	100,176
The circulation of all farm papers in Indiana was (Record, 85.)	669,989
The defendants' percentage of such total farm circulation in Indiana in 1931 was.....	14.95%

II.

The lineage of the defendants in Indiana was... (Record, 124.)	271,963
The lineage of all farm papers circulating in Indiana was ..... (Record, 124.)	6,148,399
The defendants' percentage of such total lineage in Indiana in 1931 was	4.42%

III.

The defendants' circulation in the whole of the United States was ..... (Record, 85, 87.)	1,444,407
The circulation of all farm papers in the whole of the United States was ..... (Record, 85.)	22,117,570
The defendants' percentage of such total was, in 1931	5.17%

IV.

The lineage of the defendants in the whole United States was ..... (Record, 123, 124.)	2,049,315
The lineage of all farm papers in the whole of the United States was ..... (Record, 123, 124.)	12,094,879
The defendants' percentage of such total was, in 1931	16.94%

V.

Defendants' circulation in the eight states of Indiana, Illinois, Wisconsin, Minnesota, North Dakota, South Dakota, Iowa and Nebraska was (Record, 85, 87.)	1,084,336
The circulation of all other farm papers in such States was ..... (Record, 85, 87.)	6,037,932
The defendants' percentage of such total circulation in 1931 was	15.22%

VI.

The defendants' lineage in the eight states of Indiana, Illinois, Wisconsin, Minnesota, North Dakota, South Dakota, Iowa and Nebraska was (Record, 87, 124.)	2,049,315
The lineage of all other farm papers circulating in such states was ..... (Record, 87, 124.)	8,757,325
The defendants' per centage of the total of such lineage in 1931 was	18.96%

VII.

The total circulation of defendants' papers in the eight states of Indiana, Illinois, Wisconsin, Minnesota, North Dakota, South Dakota, Iowa and Nebraska was ..... (Record, 85, 87.)	1,084,336

The circulation of six national farm papers (Capper's Farmer, Country Gentleman, Country Home, Farmer's Wife, Farm Journal and Successful Farmer) in the same states was.. 3,441,941
(Record, 85, 87.)

The circulation of such national farm papers in said states in 1931 was 3.17 times that of the combined circulation of these defendants.

As to Statement I foregoing:

The circulation of defendants in Indiana is arrived at by adding the numbers in column "Ind." (Exhibits 30 and 31, R. 85, 87) opposite the names of defendants.

The circulation of all farm papers in Indiana is arrived at by adding all of the figures in said column "Ind." in said exhibits.

As to Statement II foregoing:

The lineage of defendants in Indiana is arrived at by ascertaining from Exhibit 30, R. 85, that none of defendants' papers except the Indiana edition of the Prairie Farmer circulated in Indiana. Reference to Exhibit 41, R. 123, 124, shows the lineage of Prairie Farmer, Indiana Edition.

The lineage of all farm papers in Indiana is arrived at by ascertaining from Exhibit 30, R. 85, what papers circulated in Indiana, and by reference to Exhibit 41, R. 123, 124, total such lineage.

As to Statement III, foregoing:

The defendants' circulation in the United States is arrived at by totaling the figures opposite the names of the

defendants in the column "Net paid average," in Exhibit 30, R. 85. The circulation of all farm papers in the United States is arrived at by totaling all the numbers in said column of said exhibit.

As to Statement IV, foregoing:

The Exhibit 41, R. 123, 124, shows the lineage of each defendant separately. We have added these separate lineages to arrive at the lineages of these defendants; and the exhibit shows the total lineage of all farm publishers there set forth.

As to Statement V, foregoing:

Defendants' circulation in these eight states is arrived at by totaling the numbers in the column under such states in Exhibits 30 and 31, R. 85, 87. The circulation of all other farm papers in such states is arrived at by the same method.

As to Statement VI, foregoing:

The defendants' lineage in said eight states is the total of their lineage as shown by Exhibit 41, R. 123, 124. The lineage of all other farm papers in such states is arrived at by ascertaining from Exhibits 30 and 31, R. 85, 87, what papers circulated in such states and then by reference to Exhibit 41, R. 123, 124, totaling the lineage of such papers.

As to Statement VII, foregoing:

The figures in this statement are arrived at by computations by addition based on Exhibits 30 and 31, R. 85, 87.

The percentages set forth in all said foregoing statements are arrived at by divisions made by us from the figures above set forth, arrived at in the manner above stated.

The unit or measure of advertising is the line. Now the evidence in this record is that if advertising is bought separately from each of the defendants the cost per line in all defendants' papers is $7.25. If the same line is bought at wholesale through the Midwest Unit, in all papers, the cost is $7 per line. The saving is, therefore, 25 cents per line, which is a saving of 3.448 per cent on the line basis by the use of the defendants' joint rate.

If a full page is bought in each paper, of course, a larger discount is given by the defendants because of the quantity advertising. (Rec., 133.) On the basis of a full page in each of defendants' papers, the evidence shows that a full page advertisement in all the papers published by the defendants is $5,531.20, if bought separately, and that the cost of the same matter purchased through the agency of the Midwest Farm Paper Unit is $4,870. (Rec., 52; Ex. 12.) The differential, then, in favor of the wholesale rate through the Midwest Farm Paper Unit is but 11.94 per cent on a full page basis. The evidence shows further that less than 25 per cent of the advertising lineage of the defendants comes to them through the Midwest Unit.

There is no word of evidence that any advertiser using the plaintiff's paper has discontinued advertising with plaintiff and come to us because of the joint rate the defendants quote.

PROPOSITIONS AND AUTHORITIES.

I.

To justify recovery under the treble damage section of the Sherman Anti-Trust Act injury must result from something forbidden or made unlawful by Section 1 or 2 of the act.

Virtue v. *Creamery Package Company,* 227 U. S. 8, 24.

II.

The primary purpose of the act is to foster competition.

Whitwell v. *Continental Tobacco Company,* 125 Federal 454-461 (8th circuit).

Board of Trade v. *U. S.,* 246 U. S. 231, 238.

III.

Restraint of trade must be direct and not incidental or indirect.

Hopkins v. *U. S.,* 171 U. S. 578, 592.

Anderson v. *U. S.,* 171 U. S. 604, 615.

U. S. v. *American Linseed Oil Company,* 262 U. S. 371, 388.

IV.

Agreements concerning advertising rates are not interstate commerce.

Blumenstock Bros. v. *Curtis Pub. Co.,* 252 U. S. 436, 438.

V.

A combination to sell a product by joint effort of owners at agreed prices is not violative of the Sherman Anti-Trust Act if the members do not control a major part of the product.

Standard Oil Co. v. *U. S.*, 283 U. S. 163, 175.
Appalachian Coals v. *U. S.*, 288 U. S. 343.

ARGUMENT.

The District Court did not err in directing a verdict.

For an action to be sustained under the Sherman Act there must be shown some violation of Section 1 or 2. As stated in *Virtue* v. *Creamery Package Co.*, 227 U. S. 8, 24:

> "To justify recovery, therefore, injury must result from something forbidden or made unlawful by the act, and what is forbidden or made unlawful is expressed in Sections 1 and 2."

The burden is upon the plaintiff to show: *First,* that the acts charged in the petition constituted (as to Count I) a conspiracy, the necessary effect of which would be to restrain interstate commerce and (as to Count III) a combination or conspiracy, the necessary effect of which would be to monopolize the business of advertising in farm papers; and, *Second,* that the members of the claimed conspiracy have such control over the business described in the complaint that their conduct could materially restrain or monopolize interstate commerce.

The Sherman Act has been so often and definitely construed that corollaries are well settled to the effect that the primary purpose of the act is to foster competition and that the restraint of trade condemned by the statute must be direct and not merely incidental. Further it is the rule that securing advertising contracts is not interstate commerce. And it is finally decided that there can be no monopoly of an industry or of any trade by those whose combined ownership of the product or the means of producing it is not a major part of the whole.

The primary purpose of the Anti-Trust Law is to foster competition in interstate and foreign commerce.

The above principle seems obvious from an examination of the statute. Section 1 of the Act makes it unlawful to make a contract or enter into a combination or conspiracy to restrain interstate or foreign commerce. Section 2 of the Act makes it unlawful to monopolize or attempt to monopolize interest or foreign commerce and thereby prevent competition. It would seem logically to follow that acts and contracts which simply constitute or contemplate competition are not affected by the Act.

The late Judge Sanborn in the case of *Whitwell* v. *Continental Tobacco Co.*, 125 Fed. 454, stated the principle at page 461 as follows:

> "It is contended, however, that this selection by the defendants of customers who refrained from selling the goods of their competitors violated Section 2 of of the Anti-Trust Act, because it was an 'attempt to monopolize part of the trade or comerce among the several states.' It is admitted that the practice of the defendants was not only an attempt, but a successful attempt, to monopolize a part of this comerce. But is every attempt to monopolize any part of interstate commerce made unlawful and punishable by Section 2 of the act * * *? If so, no interstate commerce has ever been lawfully conducted since that act became a law, because every sale and every transportation of an article which is the subject of interstate commerce is a successful attempt to monopolize that part of this commerce which concerns that sale or transportation. An attempt by each competitor to monopolize a part of interstate commerce is the very root of all competition therein. Eradicate it, and competition necessarily ceases—dies. Every person engaged in interstate commerce necessarily attempts to draw to himself, and to exclude others from, a part of the trade; and if he may not do this, he may not compete with his rivals, all other persons and corporations must cease to secure

for themselves any part of the commerce among the states, and some single corporation or person must be permitted to receive and control it all in one huge monopoly. The purpose of the act of July 2, 1890, was, however, to prevent the stifling of competition, not to destroy it or to foster monopoly, and any construction of any of its provisions which would give it such an effect is unreasonable and inconsistent with the object and spirit of the law. It is an interpretation which fosters the mischief it was passed to remedy, and destroys the remedy provided to abate the evil, while a sound construction would tend to abate the mischief and to promote the remedy. It cannot, therefore, be the true meaning of the second section of this law that every attempt to monopolize any part of interstate commerce is illegal."

The Supreme Court of the United States in *Board of Trade* v. *United States,* 246 U. S. 231, 238, said:

"But the legality of an agreement or regulation cannot be determined by so simple a test as whether it restrains competition. Every agreement concerning trade, every regulation of trade, restrains. To bind, to restrain, is of their very essence. The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition, or whether it is such as may suppress or even destroy competition. To determine that question the court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint is imposed; the nature of the restraint, and its effect, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts."

The restraint of trade condemned by the statute must be direct and not merely indirect or incidental.

In *Hopkins* v. *United States,* 171 U. S. 578, at page 592, it is said:

> "The contract condemned by the statute is one whose direct and immediate effect is a restraint upon that kind of trade or commerce which is interstate. Charges for such facilities as we have already mentioned are not a restraint upon that trade, although the total cost of marketing a subject thereof may be thereby increased. * * *
>
> "To treat as condemned by the act all agreements, under which, as a result, the cost of conducting an interstate commercial business may be increased would enlarge the application of the act far beyond the fair meaning of the language used. There must be some direct and immediate effect upon interstate commerce in order to come within the act. The state may levy a tax upon the earnings of a commission merchant which were realized out of the sales of property belonging to non-residents, and such a tax is not one upon interstate commerce because it affects it only incidentally and remotely, although certainly."

Again in *Anderson* v. *United States,* 171 U. S. 604, at page 615, it is said:

> "It has already been stated in the *Hopkins case,* above mentioned, that in order to come within the provisions of the statute the direct effect of an agreement or combination must be in restraint of that trade or commerce which is among the several states, or with foreign nations. Where the subject-matter of the agreement does not directly relate to and act upon and embrace interstate commerce, and where the undisputed facts clearly show that the purpose of the agreement was not to regulate, obstruct or restrain that commerce, but that it was entered into with the object of properly and fairly regulating the transaction of the business in which the parties to the agreement were engaged, such agreement will be upheld as not within the statute,

where it can be seen that the character and terms of the agreement are well calculated to attain the purpose for which it was formed, and where the effect of its formation and enforcement upon interstate trade or commerce is in any event but indirect and incidental, and not its purpose or object."

In the case of *United States* v. *American Linseed Oil Co.*, 262 U. S. 371, 388, the court said:

"The Sherman Act was intended to secure equality of opportunity to protect the public against evils commonly incident to monopolies and those abnormal contracts and combinations which tend directly to suppress the conflict for advantage called 'competition,'—the play of the contending forces ordinarily engendered by an honest desire for gain. 'The statute did not forbid or restrain the power to make normal and usual contracts to further trade by resorting to all normal methods, whether by agreement or otherwise, to accomplish such purpose. * * * The words 'restraint of trade' should be given a meaning which would not destroy the individual right to contract, and render difficult, if not impossible, any movement of trade in the channels of interstate commerce—the free movement of which it was the purpose of the statute to protect.' *United States* v. *American Tobacco Co.*, 221 U. S. 106."

Whether or not the joining of the defendants in selling their advertising at a cheaper rate, if many papers are used, than the rate would be if but one were employed is a violation of the Sherman Act depends upon two things: *First*, whether or not the business of securing advertising contracts is interstate commerce; and, *Second*, whether or not, if such contracts are interstate commerce, the act of making such contracts jointly affects the public interest by unduly restricting competition or unduly obstructing the course of trade or by tending to create a monopoly in favor of those joining. We submit that both of these pur-

poses must be resolved unfavorably to the contentions of the plaintiff.

An agreement concerning advertising rates or the making of advertising contracts is not interstate commerce.

This principle was expressly decided by the Supreme Court of the United States in *Blumenstock Bros* v. *Curtis Pub. Co.*, 252 U. S. 436, 438. This was an action brought under the treble damage section of the Sherman Act in the Northern District of Illinois. The facts are stated by the court as follows:

> "So far as it is necessary for our purpose the cause of action of the plaintiff may be said to rest upon the allegations: That the plaintiff is engaged at Chicago in conducting an advertising agency. That when customers or principals desire to place advertisements in the magazines and periodicals of the trade they make plaintiff their agent, and plaintiff contracts with the defendant and other publishers and distributors of magazines; that plaintiff had many customers for whom it placed advertisements in the periodicals published and distributed by the defendant and in other periodicals of other publishers, all of which were distributed throughout the United States and the several States thereof; that the defendant was the owner and publisher of three periodicals sold and distributed throughout the United States known as 'The Saturday Evening Post,' 'The Ladies Home Journal,' and 'The Country Gentleman'; that the business of the defendant in publishing, selling and distributing said periodicals was interstate commerce. The character of each of the several publications is described, and a large circulation is attributed to each of them; and it is stated that in publishing and distributing said periodicals defendant held itself out as desirous of taking, receiving, printing, publishing and distributing throughout the United States its publications and advertisements to persons, firms and corporations concerning their business and occupation; that in the course of the

business the defendant dealt with the plaintiff and other advertising agencies; that the defendant in the regular course of its business dealt with not only advertisers, but with advertising agencies such as the plaintiff, and it is alleged that such dealings were transactions of interstate commerce, and that the business of editing, publishing and distributing throughout the United States the advertising matter contained in said publications, pursuant to contracts made with its customers and advertising agencies, was interstate commerce; that such commerce is dependent for its operation and growth upon advertising facilities offered by magazines and periodicals such as those of the defendant, and that such publications constitute the chief method of presenting to the buying public the articles held out for sale; that the advertising facilities were necessary to dealers, merchants, and manufacturers in order to bring their products to the notice and attention of purchasers; that the defendant's periodicals, particularly 'The Saturday Evening Post,' have an important position among such publications, and are largely read throughout the United States; that 'The Saturday Evening Post' is the most necessary of such advertising mediums to the customers of the plaintiff; that the defendant's periodicals, together with certain other magazines, periodicals and publications owned by persons other than the defendant, had, to a certain extent, exclusive control of a certain field of advertising; that the magazines and other publications which control and do all the advertising business of the field in question are few in number; that for the advertising of goods and merchandise offered for sale in commerce there were no adequate facilities except those offered by the defendant and other publishers of similar magazines; that the defendant was desirous of using its preponderant position in this special field of advertising as a means of acquiring for itself and its publications, especially for 'The Saturday Evening Post,' a monopoly of the publication and distribution of advertising matter in this restricted field of advertising throughout the United tSates in violation of the Anti-Trust Act; that the defendant refused without any reasonable cause to accept proper and ordinary advertising matter or copy

offered in the usual way to the defendant by the plaintiff and other advertising agencies unless the plaintiff, and other advertising agencies, would agree to allow the defendant to increase its preponderance in said advertising field by permitting it to control and limit and reduce, at the will of the defendant, the amount of advertising given by the plaintiff and other advertising agencies to the owners and publishers of other magazines, journals, periodicals and other publications aforesaid, which were competing with the defendant in the field of advertising mentioned and described; that by reason of the illegal and wrongful acts, done by the defendant in pursuance of its attempt and scheme to create a monopoly for its own benefit in, and to monopolize the advertising business, plaintiff lost the business of its customers for whom it had been acting as agent in placing of advertisments with defendant's and other publications, and was prevented from making further contracts for the placing of advertising matter in publications of the defendant, and in consequence thereof, in any other publication of a like or similar character, to the damage of the plaintiff in the sum of $25,000.

"The declaration contains an alleged cause of action at common law, but as neither the plaintiff nor the defendant reside in the district in which the suit was brought, it is conceded that such cause of action could not be maintained in that court against the defendant's objection. Section 51, Judicial Code.

"The Sherman Anti-Trust Act (Section 7) created a cause of action in favor of any person to recover by suit in any District Court of the United States, in the district in which the defendant resides or is found, threefold damages for injury to his business or property by reason of anything forbidden and declared unlawful in the act. In order to maintain a suit under this act the complaint must state a substantial case arising thereunder. The action is wholly statutory, and can only be brought in a District Court of the United States, and it is essential to the jurisdiction of the court in such cases that a substantial cause of action within the statute be set up.

* * * * *

"The Anti-Trust Act, it is hardly necessary to say, derives its authority from the power of Congress to regulate commerce among the States. It declares unlawful combinations, conspiracies, and contracts and attempts to monopolize which concern such trade or commerce. It follows that if the dealings with the defendant, which form the subject-matter of complaint, were not transactions of interstate commerce, the declaration states no case within the terms of the act.

"Commerce, as defined in the often quoted definition of Chief Justice Marshall, in *Gibbons* v. *Ogden,* 9 Wheat. 1, 189, is not traffic alone, it is intercourse, 'It described the commercial intercourse between nations, and parts of nations, in all its branches, and is regulated by prescribing rules for carrying on that intercourse.'

"In the present case, treating the allegations of the complaint as true, the subject-matter dealt with was the making of contracts for the insertion of advertising matter in certain periodicals belonging to the defendant. It may be conceded that the circulation and distribution of such publications throughout the country would amount to interstate commerce, but the circulation of these periodicals did not depend upon or have any direct relation to the advertising contracts which the plaintiff offered and the defendant refused to receive except upon the terms stated in the declaration. The advertising contracts did not involve any movement of goods or merchandise in interstate commerce, or any transmission of intelligence in such commerce.

"This case is wholly unlike *International Textbook Co.* v. *Pigg,* 217 U. S. 91, wherein there was a continuous interstate traffic in textbooks and apparatus for a course of study pursued by means of correspondence, and the movements in interstate commerce were held to bring the subject-matter within the domain of federal control, and to exempt it from the burden imposed by state legislation. This case is more nearly analogous to such cases as *Ficklen* v. *Shelby County Taxing District,* 145 U. S. 1, wherein this court held that a broker engaged in negotiating sales between residents of Tennessee and non-resident merchants of goods situated in another State, was not engaged in interstate com-

merce; and within that line of cases in which we have held that policies of insurance are not articles of commerce, and that the making of such contracts is a mere incident of commercial intercourse. *Paul* v. *Virginia,* 8 Wall. 168; *Hooper* v. *California,* 155 U. S. 648; *New York Life Ins. Co.* v. *Deer Lodge County,* 231 U. S. 495. We held in *Hopkins* v. *United States,* 171 U. S. 579, that the buying and selling of livestock in the stockyards of a city by members of the stock exchange was not interstate commerce, although most of the livestock was sent from other States. In *Williams* v. *Fears,* 179 U. S. 270, we held that labor agents engaged within the State of Georgia in hiring persons to be employed outside the State were not engaged in interstate commerce. In *Ware & Leland* v. *Mobile County,* 209 U. S. 405, we held that brokers taking orders and transmitting them to other States for the purchase and sale of grain or cotton upon speculation were not engaged in interstate commerce; that such contracts for sale or purchase did not necessarily result in any movement of commodities in interstate traffic, and the contracts were not, therefore, the subjects of interstate commerce. In the recent case of *United States Fidelity & Guaranty Co.* v. *Kentucky,* 231 U. S. 394, we held that a tax upon a corporation engaged in the business of inquiring into and reporting upon the credit and standing of persons in the State, was not unconstitutional as a burden upon interstate commerce as applied to a non-resident engaged in selecting and distributing a list of guaranteed attorneys in the United States, and have a representative in the State. The contention in that case, which this court denied, was that the service rendered through the representatives in Kentucky, and other representatives of the same kind acting as agents of merchants engaged in interstate commerce, to furnish them with information through the mails, or by telegraph, or telephone, as a result of which merchandise might be transported in interstate commerce, or withheld from such transportation, according to the character of the information reported, was so connected with interstate commerce as to preclude the State of Kentucky from imposing a privilege tax upon such business.

"Applying the principles of these cases, it is abund-

> antly established that there is no ground for claiming that the transactions which are the basis of the present suit, concerning advertising in journals to be subsequently distributed in interstate commerce, are contracts which directly affect such commerce. Their incidental relation thereto cannot lay the groundwork for such contentions as are undertaken to be here maintained under Section 7 of the Sherman Anti-Trust Act. The court was right in dismissing the suit."

The application of this case to the case at bar is so pertinent that discussion is unnecessary. It is true that both the plaintiff and the defendants are engaged in interstate commerce in the circulation of their papers, but the plaintiff makes no complaint about the circulation of its paper. The evidence showed that its circulation was greater at the time of the trial than it had ever been before. The subject matter of its complaint was, as in the above case, the making of contracts by the defendants for the insertion of advertising matter in their papers. These contracts did not involve any movement of goods or merchandise in interstate commerce. The trial court did not err in holding that there can be no restraint or monopoly of interstate commerce when the subject matter of the complaint does not relate to interstate commerce at all.

Assuming that contracts for advertising are subject matters of interstate commerce plaintiff must still show such control by the defendants of the business of advertising as gives them monopolistic control of the entire field involved.

This principle is settled by *Standard Oil* v. *United States,* 283 U. S. 163. In that case the government prosecuted the Standard Oil Company of Indiana for a violation of the

Sherman Act. In the course of the opinion the court said (p. 175):

> "No monopoly, or restriction of competition, in the business of licensing patented cracking processes resulted from the execution of these agreements. Up to 1920 all cracking plants in the United States were either owned by the Indiana Company alone, or were operated under licenses from it. In 1924 and 1925, after the cross-licensing arrangements were in effect, the four primary defendants owned or licensed, in the aggregate, only 55% of the total cracking capacity, and the remainder was distributed among twenty-one independently owned cracking processes. This development and commercial expansion of competing processes is clear evidence that the contracts did not concentrate in the hands of the four primary defendants the licensing of patented processes for the production of cracked gasoline. Moreover, the record does not show that after the execution of the agreements there was a decrease of competition among them in licensing other refiners to use their respective processes.
>
> "No monopoly, or restriction of competition, in the production of either ordinary or cracked gasoline has been proved. The output of cracked gasoline in the years in question was about 26% of the total gasoline production. Ordinary or straight run gasoline is indistinguishable from cracked gasoline and the two are either mixed or sold interchangeably. Under these circumstances the primary defendants could not effectively control the supply or fix the price of cracked gasoline by virtue of their alleged monopoly of the cracking processes, unless they could control, through some means, the remainder of the total gasoline production from all sources. Proof of such control is lacking. Evidence of the total gasoline production, by all methods, of each of the primary defendants and their licensees is either missing or unsatisfactory in character. The record does not accurately show even the total amount of cracked gasoline produced, or the production of each of the licensees, or competing refiners. Widely variant estimates of such production figures have been submitted. These were not accepted by the

master and there is no evidence which would justify our doing so.

"No monopoly, or restriction or competition, in the sale of gasoline has been proved. On the basis of testimony relating to the marketing of both cracked and ordinary gasoline, the master found that the defendants were in active competition among themselves and with other refiners; that both kinds of gasoline were refined and sold in large quantities by other companies; and that the primary defendants and their licensees neither individually nor collectively controlled the market price or supply of any gasoline moving in interstate commerce. There is ample evidence to support these findings.

"Thus it appears that no monopoly of any kind, or restraint of interstate commerce, has been effected either by means of the contracts or in some other way. In the absence of proof that the primary defendants had such control of the entire industry as would make effective the alleged combination of a part, it is difficult to see how they could by agreeing upon royalty rates control either the price or the supply of gasoline, or otherwise restrain competition."

Appalachian Coals v. *United States,* 288 U. S. 343, is very closely in point. The United States attacked as unlawful a combination by owners of 74 per cent of the output of coal mines in a certain territory. The challenged combination was through a corporation of which the defendant mine owners owned all of the capital stock and with which they contracted to sell all of their coal through the corporation which fixed the price, established standard classifications and had other duties. The case holds that inasmuch as the defendants had no monopolistic control of the market and had no power to fix prices because of the vast amount of competition which existed, (even conceding the combination of the defendants), it was impossible for them to fix prices, and hence the court denied an injunction to the government.

The ultimate inquiry in this case in the District Court was whether or not, under the admitted facts the defendants, by contracting with advertisers for a joint rate, unduly restrained or monopolized interstate commerce. Passing by the question which has already been discussed and as we think conclusively decided, whether the field of advertising can be regarded as an industry like the manufacture of something or the production of crops, the first thing to be decided is what the business of advertising is, in order to decide whether or not it is possible to monopolize it. The business or industry, if it can be called such, of contracting with merchants to call attention to their wares by advertisements, is almost unlimited in its scope, comprising daily and weekly newspapers of all descriptions, bill board and other permanent sign advertisements, hand bills, radio and many other methods of attracting the attention of the public to a particular thing. It is almost impossible to segregate as a separate industry or field of commercial endeavor, advertising to farmers as distinguished from advertising to other people. Obviously the person who desires to sell merchandise to the extent that he offers it for sale to the public, is not concerned with the occupation of the man who buys it. However, if we arbitrarily say, without any foundation, that there is an industry consisting of advertising particularly to farmers and that that industry does involve interstate commerce and that we will eliminate the many methods of advertising to farmers and limit the industry to advertising in agricultural publications, it must then be decided whether or not A, engaged in that business, can in the endeavor to enlarge his business and meet competition, gain a monopoly of the entire field or so restrain commerce in it as to be obnoxious to free competition. This problem is not difficult in ordinary fields of commercial transactions, if the business is tangible. That is to say, if it is to be decided

whether A, B, and C can monopolize the market in corn, it is comparatively simple to ascertain how much corn there is in existence, how much A, B and C have and then deduce what effect their conduct will have on other owners of corn. Assuming that there are X bushels of corn in a given territory and A, B, and C own 9/10 X, it is obvious that they might restrain trade in the commodity. It is equally obvious that if A, B, and C own but 1/10 X, they cannot. Therefore, the inquiry in this case must follow the same plan. It must exhibit (and certainly the burden would be on the plaintiff to make the exhibition) how much of the commodity, *i. e.*, advertising lineage, is sold in a territory under consideration and how much of that commodity is controlled by the defendants in order that the facts be then examined with a view to ascertaining whether the defendants have such control of the commodity called advertising in this particular field that they would or could unduly restrain interstate commerce; or, stated in another way, whether the success of the undertaking would materially affect the trade in the particular commodity.

The plaintiff in its brief has complained that both the District Court and the Circuit Court of Appeals took as the criterion in ascertaining the extent of this industry, the circulation and lineage of farm papers circulating throughout the United States, and upon that claim he bases an argument that his claimed injury is not concerned with the whole of the United States, but only with the State of Indiana where his newspaper is published. This argument might be persuasive if it were true. But the fact is, and the record sustains the position taken by the defendants, that neither the District Court nor the Circuit Court of Appeals based the decision on such narrow foundation.

The court will understand that in order to ascertain the

extent of the so-called industry, it is necessary to know two things: first, the circulation of papers engaged in this farm advertising business; and second, the advertising lineage which these papers carry. There is no particular relationship between the two except that as circulation grows, lineage might also grow, but to know the extent of the commodity dealt in, there must be disclosed first how many people are reached by the paper itself, and second, how many advertisers take advantage of this method of reaching people. Therefore, the extent of the business depends upon the circulation and the advertising lineage.

In this case Exhibits 29 to 40 inclusive (Rec., 83 to 119), give entire data concerning the circulation of papers regarded by those engaged in that business as general agricultural papers which reach particularly the farm market. If the court will examine Exhibit 29 (Rec., 83), it will be seen that the exhibit contains a list of all such papers. Indiana has ten such papers. Exhibit 30 (Rec., 85) is a compilation of the papers circulated by these publications showing at a glance by tabulation where the circulation is. If the court will examine Exhibit 30, it will be seen that the American Agriculturist, for example, is a paper with a circulation of approximately 163,000, and has no circulation whatsoever in Indiana, whereas the American Fruit Grower, the next paper listed, which has a total circulation of 254,000, has a circulation of approximately 10,000 in Indiana. By an examination of this exhibit, No. 30, (which is for the year 1931), it may be ascertained with exactness just what the circulation in Indiana of any such paper was in 1931. The same information as to any other state of the United States may be ascertained from this exhibit. Similar exhibits were introduced, admitted by the parties to be authentic (Rec., 82), showing the circulation for the several years involved in this suit. From these exhibits it was deduced by witnesses, and can be shown by mathe-

matical computation to be true, that the circulation of such newspapers in Indiana in 1931 was 669,989.

These exhibits and this deduction by mathematics solve the first part of the problem of ascertaining the extent of this industry. The second part of the problem is to ascertain how much advertising lineage these papers carried. This computation from sources stipulated to be correct by the parties is found as Exhibit No. 41, which shows the total advertising lineage carried by all of the agricultural papers in the United States for the years 1928 to 1932, inclusive.

Attached to this exhibit is a computation which shows the percentage in these years the advertising lineage of the defendant newspapers bore to the industry in the whole United States. This exhibit discloses such a small percentage as to reduce any claim of monopoly to an absurdity, but the plaintiff contends that the percentage, while accurate enough for the whole United States, is not fair to him because it should embrace only Indiana. He presented in his brief no computation as to what percentage of this industry as it is carried on in Indiana, the defendants control. The computations which we have heretofore made in this brief from the exhibits result in a much smaller percentage than the plaintiff claims, and destroy the attempt of the plaintiff to claim that the defendants could by any possibility monopolize this industry.

Computations heretofore made (Brief, p. 11, Computation II) show that the defendants controlled but 5 per cent of the lineage in Indiana and (Computation I, Brief, p. 11) but 14.95 per cent of the circulation in Indiana.

The matter then for decision is this: Five newspapermen combine to furnish advertising in all their papers at a less aggregate rate than the same advertising would cost in all of them if taken separately. All of the news-

papers of these defendants have but 15 per cent of the lineage in the whole field, and but 5 per cent of the lineage in the State of Indiana. The remainder of the field is in free competition with each other and with the combination. Can such combination restrain commerce or monopolize it in any way?

The plaintiff, in attempting to outline a field in which it is to claim that the business of advertising to farmers has been restrained, has taken several positions. It is claimed that the proper confines of the territory under consideration should be Illinois, Michigan, Ohio and Kentucky (Complaint, Rec., 3); and that it should be "Indiana and adjoining states" (Complaint, Rec., 6) and that it should be Indiana, Illinois, Wisconsin, Iowa, Nebraska, Minnesota, North and South Dakota (Complaint, Rec., 7) and papers published (as opposed to circulated) in the foregoing eight states (Brief, p. 11) and only state farm papers. (Brief, p. 33.) As a matter of fact, it is not material which of these several criteria is employed. The record still shows that the defendants cannot, by force of physical facts, influence, restrain or monopolize commerce, because their combined and aggregate control of the industry, on any basis, is so small as to be powerless.

If the State of Indiana be taken as a basis, the defendants have but 14 per cent of the circulation. There remains 86 per cent in free competition. The defendants have but 4 per cent of the lineage. There remain 96 per cent in free competition.

If the whole United States be taken as a basis, the defendants have but 5 per cent of the circulation, leaving 95 per cent in free competition. Of the lineage, the defendants have 18 per cent, with the remaining 82 per cent uncombined and unrestrained.

If the eight states so often mentioned by plaintiff be

used for comparison, there is 85 per cent of the entire circulation free and unrestrained and 78 per cent of the lineage likewise untrammeled.

This joint rate was not made to stifle competition; it was made to meet the forceful competition of the national papers which in 1931 circulated more than three times as many papers in Indiana as did all of the defendants put together. (Rec., 122.)

The plaintiff has in its brief (pp. 10-11) presented computations purporting to show that in the eight states mentioned the defendants control from 44 to 66 per cent of the lineage. These computations are fallacious, because they are based upon an utterly untenable premise. They are based on the place where the papers are *published* and not on the place where the papers are *circulated.* It is clear that competition for advertising is not at all based on the place of publication,—it is based on the place of the circulation, the people reached—who count with the advertiser.

The combination rate is not novel in the industry. It has existed, as the record shows, since 1908. (Rec., 130.) Nor is such practice unusual in any line of trade, as witness the articles which sell at six for twenty-five cents or three for one dollar which, bought singly, would cost much more. The plaintiff itself adopts this universal method of salesmanship and merchandising when it sells its paper by single copies for 5 cents each, or $2.60 for 52, but sells 52 copies to one person for 60 cents (Rec., 89, column marked "Subscription price" opposite Indiana Farmers Guide), a reduction, to induce volume, of 76 per cent.

If, as held in *Standard Oil* v. *United States,* 283 U. S. 163, the owners of 55 per cent of the gasoline in the United States could not by combination obtain a monopoly in violation of the Sherman Act, and if, as held in *Appalachian*

Coals v. *United States*, 288 U. S. 343, the owners of 74 per cent of the coal mined in a certain territory could not obtain a monopoly in violation of the Sherman Act, then how can it be held that 5 out of approximately 300 newspapers can obtain a monopoly of advertising, and how can it be held that newspapers which do only approximately 15 per cent of the advertising in the farm journal field can obtain a monopoly? The theory of a damage suit under Section 15 of the act is that conspirators combine to crush a competitor so that, the object being effected, the conspirators will then be able to obtain a monopoly to the injury of the public. It is an impossibility for such a result to occur as shown by the record in this case. Assuming that the combination rate was for the purpose of a competitive defeat of the plaintiff (of which there is no proof whatever), the combination, if successful, would still have the competition of 85 per cent of the entire industry. It might just as well be said that the owners of 15 per cent of all of the wheat in the United States can fix the price of wheat. It is impossible for any man or group of men to obtain a monopoly of trade by the ownership of 15 per cent of the commodity. It is, therefore, submitted, on the authority of the cases cited, that the court was correct in directing a verdict for the defendants, and the affirmance by the Court of Appeals was correct.

The court did not err in overruling the plaintiff's objection to Exhibits 29, 30 and 31.

The parties to the action stipulated as follows (Rec., 16):

> "Either of the parties to said action may read in evidence before the court and jury, subject to the objection of any party that the facts offered to be so read are not material to the issues, any compilation

or data prepared by Standard Rate and Data Service, as found in any of its compilations, covering matters claimed to be pertinent to the issues in controversy."

It only remains then to ascertain whether or not these exhibits are material. They are pages taken from a book entitled, "Standard Rate and Data Service, November, 1931." (Rec., 81.) It is a standard authority containing a tabulation of all farm and agricultural papers published in the United States, including the papers published by the parties to this action. Exhibits 30 and 31 are tabulations showing the distribution of the circulation of the publications by states. (Rec., 81.) An examination of the exhibit will show that it contains the plaintiff's publication and all of the publications of the defendants, and that it shows the total circulation of each of these papers and in what states the publications are circulated and the exact amount of the circulation in each state. Without such information, consideration of the issues involved would be impossible. The question to be decided was whether or not the defendants, by offering to advertisers a combination rate, had monopolized the field of advertising or restrained interstate commerce. Without some evidence as to what that field is, how extensive it is, where it is and what it consists of, there could be no decision of the question. Plaintiff seemed to think such information was material when it made its case, because it proved the extent of the circulation of the plaintiff's publication, and further it alleged in its complaint where the magazines published by the various parties involved were distributed. It is true that plaintiff makes no complaint in the case that its circulation was impaired, but the evidence as to the number of magazines printed and where they are sold is extremely important to enable the court to ascertain the dimensions of the field it is claimed to be restricted to by the challenged combination rate.

The court did not err in overruling the objection to a question asked the witness Gregory complained of by the plaintiff.

The assignment of error in relation to this proposition which is urged in plaintiff's brief on page 36 is found in the record at page 141. The discussion and the assignment seemed to rest upon the assumption that the witness was asked to testify about his motives. It is ordinarily permissible to question a witness about his motive when he is charged with the formation of an unlawful conspiracy or the doing of an unlawful act. However, that question does not seem to directly arise, because the question objected to did not call for the defendants' motive, nor did the answer attempt to give a motive. The record is as follows (Rec., 130):

> "Q. Now, what was the effect, in past years, as to this competition of the national farm papers with the local farm papers, such as you were running?
>
> "This question was objected to on the ground that it was too remote and not proper evidence, but admitted over the plaintiff's objection and exception, on the theory that it bore upon the question of motive and whether a conspiracy had been entered into.
>
> "A. Local farm papers found it increasingly difficult to meet this national competition successfully, both because of the difficulty in making a low enough rate to compete and the difficulty of maintaining a large enough advertising force to do an adequate job of soliciting the accounts, and that condition got worse as time went on."

It will be observed that this question called for a fact, that is, what was the effect as to the competition of the national papers with local papers in past years. The objection was "that it was too remote and not proper evidence." It seems trivial to claim that there could have

been error in overruling this objection. In every case involving the Sherman Anti-Trust Act the courts have found it necessary to ascertain the state of some particular industry at the time the events took place. In this case it was material and competent for this witness to explain what kind of competition existed in the field under scrutiny in the case. *Board of Trade* v. *United States,* 246 U. S. 231, 238.

The court did not err in receiving Exhibit 41.

The parties stipulated (Rec., 16) as follows:

> "Either of the parties may read in evidence before the court and jury, subject to the objection of any party that the facts offered to be so read are not material to the issues, any compilation or data as prepared by the Advertising Record Company, and certified by it as based upon records kept by it in its regular course of business, covering matters claimed to be pertinent to the issues in controversy."

Exhibit 41 is found in the record at pages 123, 124. The certificate attached to the exhibit is found on page 125. The exhibit lists the farm papers which had been theretofore identified by Exhibits 29 to 40 inclusive, and gives a tabulation showing the total advertising by lines in these farm papers from 1928 to 1932, the purpose being to show how much of the advertising field was occupied by the defendants, how much by the plaintiff, and how much by other papers (whose circulation by states and the members had theretofore been established by the exhibits referred to) with the view to arriving at an accurate idea whether or not the defendants would or could obtain a monopoly. It was competent because of the stipulation. It was material because it goes to the very issue which was being tried. The only objection the plaintiff seems to find to the exhibit (Rec., 32) is,

"it includes the so-called National farm papers which are not in any essential sense competitors of any of the publications involved in this litigation."

This statement is not accurate and is shown to be inaccurate by the testimony of many witnesses that the very reason for the situation which existed was the direct competition of the national papers with papers like the defendants' and plaintiff's. (Rec., 121, 129, 130.)

The court did not err in refusing to permit the testimony of the witness Boggs.

Defendants produced as a part of their case Exhibit 41. (Rec., 123, 124, 125.) As has been explained this gave the total lineage of all farm papers for the years 1928 to 1932, inclusive, so that from the figures there can be deduced, and a witness did make the deduction, the amount of decrease in the lineage of all farm papers over the period mentioned. On rebuttal a witness was produced by the plaintiff who said he had computed the loss of the plaintiff, but that his computation was based on fiscal years commencing and ending in March of each year and that his computation did not include all the advertising in the plaintiff's publication but merely part of it, to-wit, the display advertising was included and the classified advertising omitted. The record on this question is at page 138. It is, therefore, obvious that this testimony cannot in any way rebut defendants' testimony simply because it is based on a different premise. It was offered as rebutting defendants' case, and it could not be rebuttal because clearly it did not refer to the same thing. The exclusion of the testimony did not in any way prejudice the plaintiff, since it only went in any event to the question of damages and not to the propositions which were essential for it to establish to recover.

Conclusion.

The plaintiff failed to establish that the defendants had violated the provisions of the Anti-Trust Act.

This action is purely statutory and is predicated upon Sections 1, 2 and 15 of the Anti-Trust Act, as found in Title 15, USCA.

From an examination of the foregoing sections, it is obvious that the plaintiff cannot recover damages merely because it may be injured by reason of the competition of the defendants. In addition to showing such damages, it is an essential part of its case that the course of conduct complained of constituted a violation of one or both of Sections 1 and 2 of the Act. This is true because Section 15, which creates the statutory cause of action, limits its right of recovery to damages incident to conduct which constituted a violation of Sections 1 and/or 2.

In other words, before the plaintiff is entitled to recovery, it must establish a state of facts from which the jury may find that the defendants have entered into a combination or a conspiracy prohibited in Sections 1 or 2—have so conducted themselves that they might be convicted of a violation of this criminal statute.

It is respectfully submitted that the proof in this case shows that the combination rate was given not to stifle competition but to increase and foster competition, that the subject-matter of the complaint does not involve interstate commerce and further that the combination rate is not in any way violative of the Sherman Anti-Trust Act, since it cannot possibly result in any restraint or monopoly of a major portion of the advertising field.

We submit the case should be affirmed.

Respectfully submitted,

Maxwell V. Beghtol,
Thomas E. Murphy,
Burke G. Slaymaker,
Clarence F. Merrell,
Attorneys for Respondents.